



April 2, 2003

Via Electronic Submission

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Request for Permission to Correct False Statements by Birch Telecom, or in the Alternative For a Waiver of the Sunshine Period Prohibition to Correct the Record in the Triennial Review Proceeding, CC Docket Nos. 01-338 and 96-98

Dear Ms. Dortch:

SBC Communications Inc. once again respectfully requests permission to correct the record in the above-referenced proceeding to address additional misrepresentations and omissions of material fact by Birch Telecom (Birch) in its March 27 letter.¹ In that letter, Birch purports to correct the record regarding Birch's prior claims that Southwestern Bell Telephone (SWBT) limits the number of hot cuts it will perform.² Birch's letter, though, does nothing of the sort. Not only does Birch "stand by" its original false statements, it actually makes *additional* misrepresentations of material fact in its effort to justify those statements. SBC therefore submits this letter to correct those original misrepresentations and to reiterate its request that Birch's inaccurate statements be referred to the Enforcement Bureau for investigation and appropriate action.³

¹ 47 C.F.R. § 1.1204(a)(10). In the alternative, for the reasons stated in SBC's *March 17 Letter* to the Commission, SBC requests a waiver of the sunshine period prohibition, to the extent necessary, to correct the record. Letter of Christopher M. Heimann, SBC, to Marlene H. Dortch, Secretary, FCC (March 17, 2003) (*March 17 Letter*).

² Letter of Jacob S. Farber, Counsel for Birch Telecom, Inc., to Marlene H. Dortch, Secretary, FCC (March 27, 2003) (*Birch March 27 Letter*).

³ In its *March 17 Letter*, out of respect for the Commission's sunshine rules, SBC refrained from discussing CLEC claims of purported "operational impairment" associated with the hot cut process, but rather limited its presentation to correcting the record regarding Birch's misrepresentations of fact. Birch apparently feels no such compunctions. Rather than limiting its discussion to the issue at hand (*i.e.*, whether its claims that SWBT limits the number of hot cuts it will perform), Birch launches into a completely irrelevant and improper discussion of hot cuts generally.

In its *March 27 Letter*, Birch asserts that it “was verbally told by an SBC employee” of a “ten line per hour central office limitation on SBC’s ability to perform hot cuts,” and therefore “stands by the statement it made in its *ex partes*” regarding “SBC’s” purported limited capacity to perform hot cuts.⁴ Incredibly, even as it acknowledges that it has no “written record” of any such statement by an SBC employee, and therefore that Birch is “unable to point to which SBC employee made the statement,” Birch claims that “*the fact remains* that the statement was made.”⁵ Birch, however, fails to mention that, in a telephone conversation on March 10, Jacob Farber (counsel to Birch) told me that Birch not only did not know whom at SBC purportedly made this statement, but also could not identify *to whom at Birch* this statement supposedly was made.⁶ Thus, Birch *unequivocally* states that SBC limits the number of hot cuts it will perform based entirely on second-hand hearsay that some unidentified person at SBC told some unidentified person at Birch that this was the case in a conversation it cannot identify and did not document. Moreover, even after SBC unequivocally denied this assertion, Birch repeated this misrepresentation on the eve of sunshine to a FCC commissioner.

But Birch’s attempts to again mislead the Commission do not end there. Birch asserts that “[t]hese types of operational limitations are consistent with Birch’s experience in . . . related contexts.”⁷ In particular, Birch claims that SWBT’s commitment to convert Birch customers served via Birch’s switch to service provided by SWBT via the UNE-P at up to six accounts/locations per day “illustrates that SBC *does* have restrictions that amount to operational impairment.”⁸ Birch states that it “pursued, and obtained, levels of performance” for that specific migration project that went “beyond those that SBC initially told Birch it was willing to provide,” and that SWBT’s six account/location commitment was “the *best* level of performance that Birch could extract from SBC.”⁹ Birch claims that, “[i]f that is the best that SBC can do when devoting extra attention” to cutting customers over from Birch’s switch to the UNE-P, “it lends credibility to the notion that its performance is far worse — and the degree of impairment

⁴ *Birch March 27 Letter* at 1, citing Morelli Letter and February *Ex Parte*. SBC notes that in its original *ex partes*, Birch limited its claims regarding limits on hot cut capacity to Southwestern Bell Telephone. SBC is unsure whether Birch intentionally seeks to imply that all of SBC’s operating companies (including Pacific Bell, Ameritech and SNET) purportedly have limited hot cut capacity, but, if so, it once again has failed to offer any support for its claims. In any event, as SBC previously has made clear, none of its operating companies cap the number of hot cuts it can or will perform. Letter of Jay Bennett to Ms. Marlene H. Dortch, Secretary, FCC, Attachment 6 (December 18, 2002).

⁵ *Birch March 27 Letter* at 1-2 (emphasis added).

⁶ *March 17 Letter* at 3.

⁷ *Birch March 27 Letter* at 2.

⁸ *Id.* (emphasis in original).

⁹ *Id.* (emphasis in original). Although Birch repeatedly refers to SBC, it presumably means SWBT.

correspondingly greater — in performing hot-cuts that cut over a current SBC DS-0 customer to a CLEC pursuant to SBC’s standard operating procedures.”¹⁰

As SBC explained in its *March 17 Letter*, however, Birch’s reference to SWBT’s six account/location commitment for migrating customers from Birch’s switch to UNE-P is not only irrelevant, but also highly misleading.¹¹ Moreover, Birch’s characterization of the genesis of SWBT’s six account/location commitment is patently false. Rather than being “extracted” from SWBT, that commitment was based on the specific resources and procedures that both Birch and SWBT agreed to devote to that specific migration project. Indeed, as the attached e-mails make clear, Birch originally proposed that SWBT migrate only *four* accounts/locations per day based on limitations on *Birch’s* ability to accommodate customer migrations.¹² Specifically, Birch stated that it had “taken a second look at its resources and would like to confirm that *it is only able to accommodate 4 customer migrations per day.*”¹³ Subsequently, Birch informed SWBT

¹⁰ *Id.*

¹¹ *March 17 Letter* at 3. SBC anticipated that Birch might refer to this commitment, however irrelevant, to support its claim that SWBT limits the number of hot cuts it performs based on a draft letter from Mr. Farber transmitted by Birch to SWBT’s account team on March 11. In that letter, Birch also asserted that the six account/location commitment somehow corroborated Birch’s claims in the *Morelli Letter* and *February 9 Ex Parte* that SWBT limits the number of hot cuts it performs. Birch asserts that its draft letter was transmitted to SBC in confidence, and suggests that I inappropriately quoted from that letter. However, as noted in my March 17 letter to the Commission, the draft letter was transmitted to SWBT’s account team, which, in turn, transmitted the letter to me. *March 17 Letter* at 3. *See also* Attachment 1 (E-mail from Jerry W. Gilmore to Brian Benison, March 11, 2003, attaching an e-mail from John Ivanuska, from Birch, to Mr. Gilmore, transmitting the draft letter). Nowhere in that transmission did Birch request that SBC treat the draft letter as confidential, nor did Mr. Ivanuska request that SBC keep the draft confidential when he discussed it with Mr. Gilmore. Nor, for that matter, did Mr. Farber request that I treat the letter as confidential when we discussed the draft, and I objected that his reference to the six account/location commitment was misleading, on March 12. Consequently, and because the draft letter originally was sent from Mr. Farber to Mr. Ivanuska at Birch (*see* Attachment 1), I believed the header stating “**CONFIDENTIAL DRAFT — Not for Public Discussion**” was intended to apply while the draft was under internal discussion at Birch. I did not believe that it applied once Mr. Ivanuska intentionally disclosed the draft by transmitting it to Mr. Gilmore at SBC, especially since Mr. Gilmore specifically told Mr. Ivanuska that he would have to discuss the draft with SBC’s Washington DC office. Birch also asserts that I “knew full well” that Birch intended to file a letter “correcting” the record, and that I inappropriately stated that SBC “was unsure ‘when or if’ Birch would correct the letter.” *Birch March 27 Letter* at 3. However, Birch knew that SBC took Birch’s misrepresentations very seriously, and that SBC had requested that Birch correct the record by March 10. As it was, SBC forbore from filing a letter correcting the record until the evening of March 17, almost a week after I informed Mr. Farber that his draft letter was misleading and therefore did not correct the record. I regret if my citation to statements in Birch’s draft letter caused Birch any distress, but had Birch promptly corrected the record as SBC requested, rather than seeking to justify its earlier misstatements with additional misleading “evidence,” SBC’s March 17 letter would not have been necessary.

¹² Attachment 2, E-mail from Deborah Jewell, Birch, to Beattie Street, *et al.*, SWBT (July 19, 2002).

¹³ *Id.* Birch further stated that: “As of 7/24, Birch will be ready to move into full production. Specifically, on that date we’ll begin issuing orders that will result in *4 customer migrations per day.*” *Id.*

that it would increase to six the number of orders it would process, which SWBT agreed to accommodate.¹⁴ The negotiated six account/location commitment thus reflected limitations imposed by *Birch*, not SWBT, as Birch claims.

SBC requests that the Commission accept this letter to correct the record regarding Birch's latest claims that SWBT imposes restrictions on hot cuts and other customer migrations that "amount to operational impairments." Rather than correct the record on this critical issue, Birch submits additional false evidence. SBC therefore reiterates its request that the Commission refer this matter to the Enforcement Bureau for investigation.

If you have any questions, please contact me at 202-326-8909.

Respectfully Submitted,

/s/ Christopher M. Heimann

Attachments

cc: Dan Gonzalez
William Maher
Michelle Carey
David Solomon
Maureen Del Duca
Jacob Farber

¹⁴ Attachment 3, E-mail from Tim Moore, Birch, to Beattie Street, *et al.*, SWBT (July 25, 2002) ("Beginning tomorrow, 7/26 Birch will restart submitting project ID requests for the Fac to UNEP project. All departments within Birch have agreed to a 6 order per day target. Just wanted to let everyone know so no one is caught off guard. Let me know if you have any questions.").

Attachment 1

Subject: FW: Letter to Christopher Heimann

Importance: High



SMDB-1582164-v1-Letter to SBC...E-Mail Documentation - SBC Mar...

-----Original Message-----

From: GILMORE, JERRY W (SBC-MSI)

Sent: Tuesday, March 11, 2003 5:11 PM

To: BENISON, BRIAN (SBC-MSI)

Cc: HEIMANN, CHRISTOPHER M (Legal); KERR, DAVID D (SBC-MSI); COOPER, LARRY B (SBC-MSI)

Subject: FW: Letter to Christopher Heimann

Importance: High

Brian:

I'm going to call you about this, it is Birch's draft response regarding the bullet point in the presentation to the FCC.

Jerry
(214) 464-5143

-----Original Message-----

From: Ivanuska, John [mailto:JIvanuska@birch.com]

Sent: Tuesday, March 11, 2003 3:26 PM

To: GILMORE, JERRY W (SBC-MSI)

Cc: KERR, DAVID D (SBC-MSI)

Subject: FW: Letter to Christopher Heimann

Importance: High

Jerry -

Here's what we've prepared. Just so I'm sure we're on the same page, let me know whether you want us to send this formally, and update the FCC accordingly. I'm indifferent, so let me know for sure what we should do

with this.

Thanks.

-----Original Message-----

From: Farber, Jacob [mailto:FarberJ@dsmo.com]

Sent: Tuesday, March 11, 2003 2:54 PM

To: Ivanuska, John

Subject: Letter to Christopher Heimann

Importance: High

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This e-mail message and any attached files are confidential and are intended solely for the use of the addressee(s) named above. This communication may contain material protected by attorney-client, work product, or other privileges. If you are not the intended recipient or person responsible for delivering this confidential communication to the intended recipient, you have received this communication in error, and any review, use, dissemination, forwarding, printing, copying, or other distribution of this e-mail message and any attached files is strictly prohibited. If you have received this confidential communication in error, please notify the sender immediately by reply e-mail message and permanently delete the original message.

To reply to our email administrator directly, send an email to postmaster@dsmo.com

Dickstein Shapiro Morin & Oshinsky LLP
<http://www.legalinnovators.com>

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Attachment 2

From: Jewell, Deborah [DJewell@birch.com]
Sent: Friday, July 19, 2002 4:09 PM
To: STREET, BEATTIE O (SWBT)
Cc: Jacobson, Diane; PARHM, TAMMY (SWBT); JAMISON, SHERIAL K (SWBT); RODGERS, MEDERICK H (SWBT); JACKSON, TONY L (SWBT); Moore, Tim; Watts, Jelinda; Weiner, Ken
Subject: Birch's DS0 to UNE/P Migration Project



Birch Contact List2.doc

Beattie:

It's been a week or so since we last discussed this project as a group and I've been asked to provide you with an quick update:

- * First, as I'm sure you know, on Monday, 7/15, Birch submitted a control sheet for the first phase of the project and submitted three (3) orders. It's my understanding that both you and Tim Moore are using these initial orders to confirm we have a process that will work well throughout the project.
- * Based on our current view, Phase 1 will encompass 181 lines. We are still confirming how many customers and orders this quantity equates to, as the orders will be issued on a per customer basis.
- * Birch has taken a second look at it's resources and would like to confirm that it is only able to accommodate 4 customers migrations per day.
- * As of 7/24, Birch will be ready to move into full production. Specifically, on that date we'll begin issuing orders that will result in 4 customer migrations per day.

In addition, we have a few action items/concerns that need to be addressed. Tim, I'm hoping you'll jump in, as needed:

- * I've attached a contact list for the key Birch project participants. Could you please provide similar information for SWB?
- * During our last call, you and Tim agreed to identify and document the process that will be used for exceptions. Is this complete and available to the team? If not, can you estimate when it might be available?
- * We also discussed preassigning the due dates for each phase. Now that you've seen the first control sheet, is this something that would still be viable and beneficial?
- * Based on the first control sheet, is SWB seeing any service types

that may create problems? If so, have you and Tim devised a plan as part of your exception process?

* Lastly, you had originally asked that we conduct weekly calls throughout the duration of the project. Given that the volumes will be limited to four customers per day, is this still a need for you? If so, can you recommend a time that would work well for you and I'll establish a standing, intercompany call.

I think that's it. It might be most beneficial to have a quick call early next week to address these issues rather than trying to address them by e-mail. If you agree, let me know and I'll set something up.

Hope you have a good weekend.

<<Birch Contact List2.doc>>

<<...OLE_Obj...>>

Deborah Jewell
Carrier Relations Manager
Birch Telecom
816-300-3286

Attachment 3

From: Moore, Tim [TMoore@birch.com]
Sent: Thursday, July 25, 2002 1:45 PM
To: FAC to UNEP Test; Jewell, Deborah; STREET, BEATTIE O (SWBT); JAMISON, SHERIAL K (SWBT); DAVIS, MICHELLE (SWBT)
Subject: Reinitiating FAC to UNEP project
Importance: High

All-

Beginning tomorrow, 7/26 Birch will restart submitting project ID requests for the Fac to UNEP project. All departments within Birch have agreed to a 6 order per day target. Just wanted to let everyone know so no one is caught off guard. Let me know if you have any questions.

Thanks,

Tim Moore
Birch Telecom
Phone- 816-300-3366
Cell- 913-481-7154
Fax- 816-300-5431